



IN THE HIGH COURT OF SOUTH AFRICA
FREE STATE DIVISION, BLOEMFONTEIN

Reportable:	NO
Of Interest to other Judges:	NO
Circulate to Magistrates:	NO

Case no: 4591/2021

In the matter between:

SECURITAS SPECIALISED SERVICES (PTY) LTD

Plaintiff

and

DOWN TOUCH INVESTMENTS (PTY) LTD

Defendant

HEARD ON: 25 AUGUST 2022

DELIVERED ON: 04 NOVEMBER 2022

JUDGMENT BY: MTHIMUNYE AJ

This judgment was handed down electronically by circulation to the parties' representatives by email, and release to SAFLII. The date and time for hand-down is deemed to be 15:00 on 04 November 2022.

-
- [1] This is an opposed application for summary judgement. The applicant, who is the plaintiff in the main action is Securitas Specialised Services (Pty) Ltd, a

private company with limited liability, duly incorporated in terms of the Companies Act 71 of 2008, with registration number 2004/035860/07, and registered address or principal place of business at Grayston Ridge Office Park, Block C, 144 Katherine Street, Sandton.

- [2] The Defendant in the main action and a Respondent in this application is Downtown Investments (Pty) Ltd, a private company with limited liability, duly incorporated in terms of the Companies Act 71 of 2008, with registration number 2004/4034226/07, and registered address or principal place of business at 511 Long Road, Welkom.

- [3] On or about 9 November 2018 the applicant and the respondent concluded an agreement in terms of which the applicant was to provide security services over the respondent's property in exchange for a fee payable on the due date notwithstanding whether or not the applicant had dispatched an invoice. The agreement was to endure for a period of 18 (eighteen) months and would be deemed to have been automatically renewed for a further period of 12 (twelve) months for an adjusted tariff applicable at that time, subject to three (3) calendar months' cancellation notice, which period of notice may not commence to run prior to the expiry of the 12 months' period, as provided in Clause 5, which reads:

"The agreement shall continue for a period of 18 months calculated from the commencement date as reflected on the Schedule and shall be deemed to have been renewed automatically thereafter for a further period of 12 months at a time at Securitas then current tariff for services prevailing from time to time. Each such period of 12 months is hereinafter referred to as "the contract period". Provided, however, that either party may give to the other not less than three consecutive calendar months' written notice of cancellation hereof, which period of notice may not commence to run prior to the expiry of the relevant contract period".

- [4] On 2 April 2021 the Respondent furnished the applicant with a written one-month Notice of Termination, in contravention of the provisions of the contract. The applicant then sued the respondent for an amount of R1 554 114.75 (One Million, Five Hundred and Fifty-Four, One Hundred and Fourteen Rand and Seventy-Five Cents) being the outstanding invoice for services rendered

during the contract period (R1 047 112.89) and contractual damages arising from the respondent's breach of the contractual terms (R507 001.86).

- [5] The applicant, contending that the respondent's plea raises no *bona fide* defence or triable issue, brought this application for summary judgment. The purpose of a summary judgement is to afford a plaintiff a speedy remedy to obtain relief where a defendant has failed to raise a bona fide defence or a triable issue. In **Joob Joob Investments (Pty)Ltd v Stocks Mavundla Zek Joint Venture 2009 (5) SA 1 (SCA)** the Supreme Court of Appeal held:

"...In South Africa, the summary judgement procedure was not intended to shut a defendant out from defending unless it was very clear indeed that he had no case in the action. It was intended to prevent sham defences from defeating the rights of parties by delay, and at the same time causing great loss to plaintiffs who were endeavouring to enforce their rights.

- [6] The respondent, in its opposing affidavit, contended that the applicant's claim be dismissed on the basis that, amongst others, it is not a liquidated claim. This particular defence was not raised in the plea, which plea contained the following defences:

- 6.1. That it was a tacit or imputed term of the security contract between the two parties that the contract was terminable on reasonable notice once the construction contract between the respondent and a third party (ACSA) in terms of which the respondent was to provide security services to ACSA for the duration of the construction contract.
- 6.2. In the alternative and in the event the court finds that the tacit term pleaded cannot be imported, the respondent pleads that Clause 5 of the security contract is unduly oppressive if it is to be applicable even if the entire substratum for the security contract disappears and further that it goes against public policy or is unconscionable in the circumstances of this case.
- 6.3. That the parties did not sign the "Agreement and Schedule of Services Permanent Contract" and argues that to the extent that it may be found to be severable, it is not valid and enforceable.

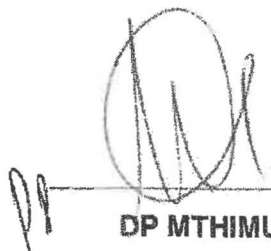
- [7] The applicant raised issues with the fact that there is no harmony between the Defendant's plea and the affidavit resisting summary judgment, because the defence of the applicant's claim not being a liquid document was not raised in the plea, which plea, according to the applicant, is just a bare denial. This is true only in as far as that particular defence is concerned, however, the plea contains a number of other defences which are incorporated in the affidavit opposing summary judgement. These are all articulated in para [6] above and will not be repeated herein. This court accepts that one of the defences (liquidated claim) was not raised in the plea and agrees with the applicant that the defendant cannot be allowed to introduce this in its opposing affidavit, however there are other defences raised in both the respondent's plea and opposing affidavit, on the basis of which this court may make a determination of whether or not they are *bona fide* and / or raise triable issues.
- [8] Both parties went to lengths on their papers about the sustainability and validity of the defences that the respondent has raised or not properly raised in the affidavit, for example whether or not the plaintiff is entitled to claim contractual damages under the circumstances; that the tacit term defence neither raises a *bona fide* defence nor a triable issue as it is a matter of interpretation by the court. All these are not before this court for determination, neither do they add any weight to whether or not the applicant is entitled to summary judgement. What is before this court is to decide if the respondent has succeeded in raising a *bona fide* defence or a triable issue, if not, the applicant would then be entitled to the relief it seeks.
- [9] For a summary judgement application to succeed, other than complying with the prescribed process in terms of Rule 32 of the Uniform Rules as amended, the applicant must prove that the defendant has no *bona fide* defence or a triable issue and has entered a notice to defend as a delaying tactic. The respondent's duty is to demonstrate that the converse is true. It is not a requirement that such defence should have a probability of success. The legal principles governing summary judgement proceedings were elegantly dealt with in **Maharaj v Barclays National Bank Ltd 1976 (1) SA 418 (A) 426**, where the Appellate Division held:

"... One of the ways in which a defendant may successfully oppose a claim for summary judgement is by satisfying the court by affidavit that he has a bona fide defence to the claim. Where the defence is based upon facts, in the sense that material facts alleged by the plaintiff in its summons, or combined summons, are disputed or new facts are alleged constituting a defence, the Court does not attempt to decide these issues or to determine whether or not there is a balance of probabilities in favour of the one party of the other. All that the Court enquired into is: (a) whether the defendant has 'fully' disclosed the nature and grounds of its defence and the material facts upon which it is founded, and (b) whether on the facts so disclosed the defendant appears to have, as to either the whole or part of the claim, a defence which is both bona fide and good in law. If satisfied on these matters, the Court must refuse summary judgement wholly or in part, as the case may be. The word "fully", as used in the context of the Rule (and its predecessors), has been the cause of some judicial controversy in the past. It connotes, in my view, that, while the defendant need not deal exhaustively with the facts and the evidence relied upon to substantiate them, he must at least disclose his defence and the material facts upon which it is based with sufficient particularity and completeness to enable the court to decide whether the affidavit discloses a bona fide defence."

[10] Even when an opposing affidavit lacks sufficient particularity on material facts upon which the respondent relies, the court is empowered, in circumstances it deems appropriate, to exercise discretion in favour of the respondent where there is doubt on whether the applicant's case is unanswerable – **Tesven CC v South African Bank of Athens 2000 (1) SA 268 (A)**. Having considered the papers and all the submissions made before me, I am persuaded that the respondent has raised a *bona fide* defence and triable issues. It follows therefore that this application must fail.

[11] In the result, I make the following order:

1. The application is dismissed.
2. Costs in the cause


DP MTHIMUNYE AJ

Appearances:

On behalf of applicant: Adv J Scheepers
Chambers, Bloemfontein
Instructed by: Symington & De Kok

On behalf of respondent: Adv W A Van Aswegen
Chambers, Bloemfontein
Instructed by: Peyper Attorneys